FRANCIS A/L SINGARAYAN

v.

PUSPARAJU A/L SOLAY & 2 ORS.

HIGH COURT MALAYA, SHAH ALAM
DATO' MAHADEV SHANKAR J.
[ORIGINATING SUMMONS NO. 21-62-91]
7 MAY 1994

LAND LAW: 1st defendant/vendor entering into agreement to sell land to plaintiff - Plaintiff lodging caveat on land - Original title handed to plaintiff - Vendor fraudulently obtaining duplicate grant of title and charging land to 2nd defendant for a loan - 2nd defendant registering charge - Plaintiff's caveat lapsing but only cancelled after registration of 2nd defendant's charge - Vendor defaulting in loan repayment - 2nd defendant obtaining order for sale - Second sale & purchase agreement executed between vendor and plaintiff's sons - Vendor to transfer property to plaintiff's sons in exchange for their redemption of loan - Provisions of agreement not implemented - 2nd defendant exercising rights under charge - Plaintiff applying to Court for stay of auction, a declaration that charge was null and void and other reliefs - Whether 2nd defendant bona fide party without notice of 1st defendant's fraud - Whether registration of charge null and void - Whether first caveat had any legal effect to block registration of charge.

On 14 October 1971 the 1st defendant/vendor entered into an agreement with the plaintiff to sell his land. It was a term of the agreement that as soon as the title was issued, the vendor would execute a valid and registrable transfer. In 1970 the the title deed was issued but the vendor failed to hand it over to the plaintiff. On 11 November 1979, the plaintiff lodged a caveat on the land and pursued the vendor for the title which was only handed over upon the plaintiff making a further payment to the vendor pursuant to a second agreement. However, in fraud of the plaintiff and the state, the vendor procured the issue of a duplicate grant of title by alleging that he had lost the original and proceeded to charge the land to the 2nd defendant for a loan. The caveat lodged by the plaintiff lapsed after 6 years i.e. on 11 January 1985 but was only cancelled by the land office on 17 November 1986; that is, after the 2nd defendant had registered its charge on 13 November 1986. The vendor subsequently defaulted in the repayment of his loan and the 2nd defendant obtained an order for sale. Upon learning of the proposed auction, the plaintiff and his wife made a police report and persuaded the 2nd defendant to call off the auction by paying the costs of the aborted auction. On 30 June 1979, a second sale and purchase agreement was executed between the vendor and the plaintiff's three sons whereby the vendor was to transfer the land to the plaintiff's sons in exchange for their redemption of the loan. These provisions were not implemented and the 2nd defendant exercised their rights under the charge and obtained a date for auction of the land. The plaintiff applied for a stay of the auction, a declaration that the charge was null and void and other reliefs.

Held:

[1] This was an obvious case where the plaintiff had been defrauded by the 1st defendant. However, the Court took the view that when the 2nd defendant came into the picture in 1986 they were a *bona fide* party who had advanced the loan without notice of the 1st defendant's fraud.

[2] The plaintiff's first caveat lodged on 11 January 1979 had in law no legal effect after six years and would have lapsed in January 1985. Consequently it did not have the legal effect of blocking the registration of the charge.

[3] The Court dismissed the plaintiff's application and also dismissed a further application that all proceedings by the 3rd defendant to have the land sold be stayed until an appeal against the Court's decision had been disposed off.

[Application dismissed].

For the plaintiff - Kalai; M/s. Kalai & Partners
For the 2nd defendant - L.S. Ng; M/s. Sothi & Ang
For the 3rd defendant - Nasir, State Legal Advisor's Office

JUDGMENT

Mahadev Shankar J:

Pusparaju a/l Solay the first defendant (hereafter referred to as the vendor) applied in late 1971 to the relevant authority for a piece of land in Batu Caves. He was successful. The land, allotted to him (the said land) was the subject of an approved application. Title to such land is only issued years later.

On the 14 October 1971 the vendor entered into an agreement with the plaintiff to sell the said land for RM1,400. A formal agreement was executed by both parties and vacant possession was given to the plaintiff immediately. The plaintiff then built a house on the said land at the cost of RM12,000 and went into occupation of the said house with his family.

It was a term of the said sale & purchase agreement that as soon as the title to the said land was issued, the vendor should execute the valid and registrable transfer.

In 1970 the title deed was issued and the plaintiff paid the first premium. However the vendor did not hand over the title deed.

So on 11 November 1979 the plaintiff lodged a caveat against the said land. He pursued the vendor for the title. The vendor insisted on a further sum of RM3,000 being paid to him for this. On 30 June 1979 another agreement was drawn up between the parties. Under this agreement the RM3,000 required by the vendor was paid to him, and in return he handed over the original grant to the plaintiff, and undertook forthwith to apply to the State Authority to obtain consent to transfer the said land to the plaintiff as provided in the sale & purchase agreement of 14 October 1971. This agreement also incorporates a power of attorney to ensure that the plaintiff would be free to exercise his rights of beneficial ownership over the said land.

In these circumstances, had the consent of the State Authority been forthcoming, the plaintiff would have had an unanswerable claim for specific performance. There is proof here beyond all reasonable doubt that the first defendant had collected RM17,000 for transferring his rights to the said land to the plaintiff.

However, contrary to his obligations under the two agreements and in fraud of the plaintiff and the State, the vendor procured the issue of a duplicate grant of title to him on 21 August 1985 by alleging that he had lost the original. This is a criminal offence but the vendor appeared to have escaped prosecution to this day.

Having got the duplicate title on 13 November 1986, the vendor charged the said land to the second defendant for a loan.

In the normal course of events the caveat lodged by the plaintiff would have lapsed six years thereafter, i.e. on 11 January 1985. However the Land Office did not punctually cancel the caveat on that day. The second defendant (Mui) registered its charge on 13 November 1986. The plaintiff's first caveat was only cancelled on 17 November 1986.

On 13 January 1988 the plaintiff filed a second caveat against the property. He also applied directly to the State Authority for consent to have the property transferred to himself and this authority he obtained by way of a letter in writing dated 17 June 1988. However, he does not appear to have been able to get the vendor to sign the memorandum of transfer.

The vendor defaulted in the repayment of his loan to Mui, who got an order of sale. The auction was fixed for 2 August 1988.

The plaintiff's wife learnt of this when the auctioneer's agent came to survey the property. She and the plaintiff both made police reports of the manner in which they had been cheated by the vendor. The police took no action. The plaintiff also persuaded Mui and its solicitors to call off the auction in order to enable them to resolve the predicament in which they now found themselves. They paid RM4,919 for the costs of the aborted auction.

At this point the vendor made his appearance. The loan and interest at that point was quantified by Mui at RM60,000. Mui was not prepared to release its hold of the property unless this money was paid. On 14 April 1990 the same solicitor who had prepared the second agreement between the plaintiff and the vendor on 30 June 1979 now drew up a second sale & purchase agreement between the vendor and the three sons of the plaintiff. This document is almost impossible to understand. These solicitors described the vendor as the registered and beneficial owner of the property when they must have been fully-aware of the evidence to the contrary. By the agreement the vendor was to transfer the property to the plaintiff's three sons in exchange for their redemption of the loan made by Mui. A sum of RM10,000 was paid up front by the plaintiff's wife and remaining RM40,000 had to be paid over a period of time. The plaintiff claimed that this arrangement was necessary because Mui was not prepared to make any loan to him on account of his excessive age.

After these documents were signed it would appear that these provisions were not implemented because on 13 February 1991 Mui refused to grant a loan and fell back on its rights under their charge. Consequently they went back to the P.T.D. Gombak and got the property put up for auction on 12 March 1991.

It is at this point that the plaintiff came to Court. The reliefs that he prayed for in the present application were for the auction to be stayed, for a declaration that the charge by the vendor to Mui on 13 November 1986 was null and void and of no effect, that the third defendant be directed to expunge the said charge, and that the vendor be required to execute all necessary documents to transfer the said land to the plaintiff, that the deposit of RM10,000 be refunded by Mui to the plaintiff or alternatively that upon the plaintiff paying Mui the sum of RM50,000 including the deposit of RM10,000 aforesaid, the charge be discharged and for costs. I dismissed this application and I also dismissed a further application that all proceedings by the third defendant to have the said land sold be stayed until an appeal against my decision had been disposed off.

I have to put it upon record that I have reached these decisions with utmost hesitation and regret because this is an obvious case where the plaintiff has been defrauded by the first defendant.

I took the view that when Mui came to the picture in 1986 they were a *bona fide* party who had advanced this loan without notice of the first defendant's fraud in obtaining a duplicate title. The plaintiff's first caveat lodged on 11 January 1979 would have lapsed in January 1985 and consequently it did not have the legal effect of blocking the registration of the charge.

Counsel for the plaintiff has pointed out that the first caveat was only cancelled by the collector on 17 November 1986. He submits therefore that the registration of the charge on 13 November 1986 was null and void. This is an attractive point to argue but in law the first caveat had no legal effect after six years. It must be admitted that to some extent Mui was put on notice of the plaintiff's claim to the property but then their defence is that they were not obliged to investigate a caveat without any legal force.

The other difficulty about this case is that it is really an attack on the foreclosure proceeding between Mui and the first defendant which resulted in the order of sale being made by the third defendant. The plaintiff was not a party to those proceedings. It is an open question whether he should not have intervened there. There is no appeal against the order of the third defendant and in the circumstances the nett effect of my granting the reliefs claimed was the equivalent of a *certiorari* to quash foreclosure proceedings.

Regrettably my grounds for refusing relief to the plaintiff in this case are all highly technical. It is to be hoped that better minds than mine will be able to provide a practical solution to the plaintiff's difficulties and bring the vendor to account.